

**U.S. Department of Labor**

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Date Issued: September 29, 2000

Case No: 1999-BLA-1327

In the Matter of

JACKIE KING,

Claimant,

v.

SOUTHERN OHIO COAL COMPANY,

Employer,

and

DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS,

Party-in-Interest.

**APPEARANCES:**

Barbara Holmes, Esquire  
For the claimant

Barbara North, Esquire  
For the employer

**BEFORE:** DONALD W. MOSSER  
Administrative Law Judge

**DECISION AND ORDER DENYING BENEFITS**

This proceeding arises from a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972 and the Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 901 et seq. This case was referred to the Office of Administrative Law Judges by the District Director, Office of Workers' Compensation Programs on September 7, 1999.

In a case involving a living coal miner, benefits are awarded under the Act to a claimant who is totally disabled within the meaning of the Act due to pneumoconiosis arising out of coal mine employment. Pneumoconiosis is defined in the Act as a dust disease of the lungs arising from coal mine employment and the disease is commonly known as black lung.

Following proper notice to all parties, a formal hearing was held in regard to this claim on March 14, 2000 at Chillicothe, Ohio. The Director's exhibits were offered in evidence at the hearing pursuant to 20 C.F.R. § 725.456, and the parties were afforded the opportunity to present additional evidence. Counsel also were allowed to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based upon my analyses of the entire record and my observation of the demeanor of the witness who testified at the hearing. Each exhibit and argument of the parties, although perhaps not specifically mentioned, has been carefully reviewed and thoughtfully considered. Where the contents of certain medical evidence in the record appear inconsistent with the conclusions reached in this decision, it should be considered that the appraisal of the relative merits of each item of medical evidence has been conducted in conformance with the quality standards of the regulations.

Section numbers hereinafter cited exclusively pertain to Title 20, Code of Federal Regulations. References to DX and EX pertain to the exhibits of the Director and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

#### ISSUES

The following controverted issues remain for decision:

1. the length of Mr. King's coal mine employment;
2. whether the evidence establishes a material change in conditions within the meaning of Section 725.309(d);
3. whether the evidence establishes a change in conditions or a mistake in a determination of fact within the meaning of Section 725.310;
4. whether the claimant has pneumoconiosis as defined by the Act and regulations;

5. whether his pneumoconiosis arose out of coal mine employment;

6. whether he is totally disabled; and,

7. whether his disability is due to pneumoconiosis.

(DX 35, Tr. 7-9).

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### Background

Mr. King filed his first claim for benefits on April 28, 1986. That claim was denied by the Office of Workers' Compensation Programs ("OWCP") on September 6, 1986. (DX 32). Since the denial was not appealed, that claim was abandoned.

The claimant filed his next claim on July 18, 1989. OWCP, on December 12, 1989, denied that claim under Section 725.309 on the ground the claimant had failed to establish a material change in his condition. (DX 33). That denial also was not appealed. Thus, that claim was abandoned.

On February 11, 1997, Mr. King filed another claim for benefits, which was denied by OWCP on June 2, 1997. The claimant then filed a request for modification of the February 11, 1997 claim on September 3, 1997. Once again, OWCP denied this request for modification on December 22, 1997.

Mr. King filed the current claim on June 22, 1998, which was treated by OWCP as another request for modification and denied the request on October 16, 1998. The claimant requested a formal hearing on December 30, 1998. An appeal to the Office of Administrative Law Judges was filed on September 7, 1999. (DX 1, 19, 24, 32, 33, 35).

The claimant, Jackie King, was born on September 14, 1934. He married Doris Cash on October 21, 1956 and divorced her on November 4, 1985. He claimed no dependents on his most current application for benefits.

Various smoking histories for Mr. King are contained in the record. The claimant testified he smoked from about age 19 until age 29. He stated the most he smoked during that time was about one pack of cigarettes per day or less. (Tr. 26). He also indicated that he did chew tobacco on occasion. At the hearing, Mr. King stated he is currently around quite a few people who smoke. (Tr. 27). However, the physicians' reports relating to examinations of Mr. King contain smoking histories of the miner which differ significantly from his

testimony. Thus, I find the claimant's testimony regarding his cigarette smoking is not credible.

### Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. See *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Mr. King alleged 26 years of coal mine employment. (DX 1). The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1953 to 1984, employment history forms, applications for benefits, letters from co-workers, and claimant's testimony. (DX 2, 4, 20, 22).

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. See *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (*en banc*); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

A claimant must establish that loading coal was integral to the extraction or preparation of coal. If the primary purpose is to deliver coal to customers, the time at the tipple loading coal does not constitute coal mine employment. *Swinney v. Director, OWCP*, 7 BLR 1-524 (1984). The claimant testified that he worked underground doing coal mine work for his dad for about three years. (Tr. 14-15). He further testified that he hauled coal to schoolhouses, personal residences, and state highway garages for W. W. Jeffers for about 18 years. (Tr. 12). Jerald Eberts submitted a letter stating that Mr. King hauled coal from the mine tipple to garages, schoolhouses, and personal residences from 1958-1973. (DX 22). Mr. King first testified that he hauled coal just in the wintertime, (Tr. 13), and later stated that he hauled coal eight or nine months out of a year. (Tr. 33).

The record also contains letters from several co-workers which indicate Mr. King hauled coal from 1959 through 1977 for Mr. Jeffers. (DX 20). The social security records indicate that Mr. King worked for Southern Ohio Coal Company for eight years. The employer stipulated that Mr. King has eight years of coal mine employment with Southern Ohio Coal Company. (Tr. 6-7). The record also indicates that the claimant worked for 14 years and one quarter for Dundas Pallet Company, which Mr. King testified was connected with W. W. Jeffers. (DX 4; Tr. 12).

Mr. King testified that he worked doing underground coal mine work for his father for three years. Because this testimony is not contradicted by any of the evidence of record, I give credit to the claimant's testimony regarding this job and therefore credit him with three years of coal mine employment. I also credit the miner with an additional eight years of coal mine employment, to which the employer has stipulated. However, I find that the claimant's work for Dundas Pallet Co. and W. W. Jeffers did not constitute coal mine employment due to the fact that Mr. King was loading processed coal and transporting it directly to the consumer. Overall, I credit the miner with 11 years of coal mine employment.

At Southern Ohio Coal Company, Mr. King worked as a roof bolter and had to carry and load his own glue boxes, which each weighed about 30 pounds. (DX 5). He also worked as a pumper which required him to pump the water out and keep the water off of the tracks. (Tr. 17).

#### Responsible Operator

Southern Ohio Coal Company conceded it is the last employer in the coal mining industry for whom Mr. King worked for a cumulative total of at least one year and for one day after December 31, 1969. That company therefore is the properly designated responsible operator in this case. 20 C.F.R. §§ 725.492 and 725.493. (DX 32).

#### Material Change in Condition<sup>1</sup>

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<sup>1</sup>The list of issues also indicates the controversion form (Form CM-1025) noted the issue of modification under Section 725.310 was contested. As the discussion of the procedural history indicates, Mr. King indeed filed modification requests or additional claims which were considered by OWCP as modification requests of the denial of his February 11, 1997 claim. Those requests or claims serve to keep his February 11, 1997 claim open since they were all timely filed within one year of the previous denial. 20 C.F.R. § 725.310. Thus,

I. Medical Evidence

The medical evidence of record is as follows:

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the primary inquiry in this case is whether Mr. King's February 11, 1997 claim should be denied under Section 725.309 on the grounds the newly submitted evidence fails to prove the miner's condition has changed since the December 12, 1989 denial of his July 18, 1989 claim.

A. X-rays

<u>DATE OF X-RAY</u> <u>(REREADING)</u>	<u>EXHIBIT NO.</u>	<u>PHYSICIAN/</u> <u>QUALIFICATIONS</u>	<u>READING</u>
8/17/92	EX 1	Y. Choice	small rounded density in the right midlung field, could be granulomatous disease
9/20/93	EX 1	Y. Choice	few hazy granulomatous nodules seen in the left lower lobe
2/4/94	EX 1	J. Ho	no active cardiopulmonary pathology
3/11/97	DX 9	P.B. Long	12mm ovoid density overlying right mid-lung; pulmonary nodule can not be excluded, mild apical pleural thickening bilaterally, no infiltrate identified, no pleural effusion
3/11/97 (5/19/97)	DX 10	W. S. Cole/Board-certified radiologist and B-reader	1/0, q/s
5/19/97	DX 27	Y. Choice	granulomatous nodular density grown from 5 mm to 12 mm, no calcification is recognized
11/10/98	DX 27	Y. Choice	1 cm hazy granulomatous nodule present in the middle of the right lung with no interval change
1/24/00	EX 4	D. Hume	no active disease, changes suggesting emphysema are present
<u>DATE OF X-RAY</u> <u>(REREADING)</u>	<u>EXHIBIT NO.</u>	<u>PHYSICIAN/</u> <u>QUALIFICATIONS</u>	<u>READING</u>

1/24/00	EX 5	J. Lockey/Board-certified radiologist and B-reader	no parenchymal or pleural ab- normalities con- sistent with pneumoconiosis
1/24/00 (4/28/00)	EX 5	R. Shipley/Board-certified radiologist and B-reader	no parenchymal or pleural ab- normalities con- sistent with pneumoconiosis

#### B. Pulmonary Function Studies

<u>DATE</u>	<u>EXHIBIT</u>	<u>HEIGHT</u>	<u>AGE</u>	<u>FVC</u>	<u>FEV<sub>1</sub></u>	<u>MVV</u>	<u>TRACINGS</u>	<u>EFFORT</u>
3/11/97	DX 6	64"	62	3.73	2.49	73	Yes	Fair cooperation, Good comprehension
3/1/99	DX 28	64"	64	4.75 (Pre-bronchodilator results)	2.74 (Pre-bronchodilator results)	47.1 (Pre-bronchodilator results)	Yes Yes	Not noted
1/24/00	EX 3	64"	65	2.81 (Pre-bronchodilator results)	1.61 (Pre-bronchodilator results)	- (Pre-bronchodilator results)	Yes Yes	Good
				2.84 (Post-bronchodilator results)	1.72 (Post-bronchodilator results)	- (Post-bronchodilator results)		

#### C. Arterial Blood Gas Studies

<u>DATE</u>	<u>EXHIBIT</u>	<u>pCO<sub>2</sub></u> <u>(mm.Hg.)</u>	<u>pO<sub>2</sub></u> <u>(mm.Hg.)</u>	<u>RESTING/</u> <u>AFTER EXERCISE</u>
3/11/97	DX 8	35.0	105.0	Resting
1/24/00	EX 3	37.0	84.0	Resting

#### D. Medical Reports

The record contains medical records from the Holzer Clinic dated from April 1989 through May 1997. These records indicate that Mr. King underwent chest x-rays, electrocardiograms, arterial blood gas studies, and pulmonary function studies. In a letter dated May 5, 1997, Dr. Linder recommended that the claimant see his private physician because a small scar was found in the right mid lung field. He stated that the radiologist suggested follow up to be sure the spot is only a scar and not some other abnormality. These records also made reference to the miner's smoking history. On April 4, 1989, Dr. Berkich noted that Mr. King smoked two packs of cigarettes per day. On April 17, 1989, the same physician recommended that Mr. King quit smoking. (EX 2).



The record also contains various treatment notes of Dr. Manchester dated September 1992 through November 1999. Dr. Manchester noted that the claimant had a history of black lung disease and also diagnosed Mr. King with (ASHD) arteriosclerotic heart disease, sinusitis, tinea cruris, lower back pain, arthritis, black lung disease, angina, coronary heart disease, atherosclerotic heart disease, granuloma on chest x-ray, anxiety, chronic gastritis, post-nasal drainage, peripheral vascular disease, subclavian steal syndrome, GERD, hypocholesterolemia, hyperlipidemia, chronic obstructive pulmonary disease without exacerbation, and cerebral vascular disease. The physician also made reference to the miner's smoking history. On January 5, 1993, Dr. Manchester noted that Mr. King suffered from anxiety from cigarette smoking cessation. The physician, on June 17, 1998, stated that the claimant continued to smoke. On October 5, 1998, Dr. Manchester noted that the patient still was smoking. The physician stated on December 28, 1998 that Mr. King had a nicotine addiction and also noted that the claimant stated that he quit a few days prior to the examination. Dr. Manchester also indicated that Mr. King inquired about Zyban to ensure his success in quitting smoking. (EX 1).

Dr. Linder examined Mr. King again on March 11, 1997. He performed a physical examination, chest x-ray, pulmonary function study, and an arterial blood gas study. He noted 35 years of coal mine employment and noted that the miner never smoked, but that he chewed tobacco on occasion. Dr. Linder diagnosed Mr. King with arteriosclerotic heart disease with angina with exercise, but indicated that it was not work related. He also diagnosed an early obstructive impairment with mild pulmonary scarring. The physician further opined that the obstructive impairment was work related but was not causing a significant impairment. Dr. Linder also stated that Mr. King has a slight impairment shown by his pulmonary function studies, but it is not expected to cause disability. (DX 7).

The record contains medical records from Adena Regional Medical Center dated November 1998. These records indicate a smoking history of one pack of cigarettes per day. Mr. King was admitted for neck pain, right shoulder pain and numbness. The claimant was discharged to home and was referred to follow up with Dr. Stephen Manchester. (EX 4).

Dr. Stephen Manchester stated in a letter dated January 1, 1999, that Mr. King had been under his care since September 1992. He indicated that the miner had previously been diagnosed with coal workers' pneumoconiosis. He stated that since his evaluation of the miner was consistent with a person that has coal workers' pneumoconiosis, he did not feel the need to

do further diagnostic testing. Dr. Manchester indicated that the miner's chest x-ray findings and his CT scan of the chest showed findings that are consistent with coal workers' pneumoconiosis which has arisen out of his coal mine employment. He further opined that the miner does have an impairment that is partially disabling and is not able to do his usual coal mine work. Dr. Manchester also stated that the degree to which Mr. King's smoking contributed to his pulmonary condition is unclear. He stated the miner's smoking has been intermittent and he is not sure how much smoking he has done over the years. The physician does not feel he can speak on the question of whether or not Mr. King is totally disabled, but he does feel that the claimant is unable to work in the coal mines. (DX 27).

Mr. King was examined by Dr. Eric Pacht on March 1, 1999. The physician reviewed several of Mr. King's medical records, and issued a consultative report on April 14, 1999. The physician noted a smoking history of one-half pack of cigarettes per day for two years when Mr. King was younger. However, Dr. Pacht made a notation on an April 1989 progress note that Mr. King stated he smoked two packs of cigarettes per day. Dr. Pacht also noted 35 years of coal mine employment. The physician stated the miner's lungs are essentially clear and that Mr. King does not have any interstitial markings on his chest x-ray or chest CT scan. Dr. Pacht indicated he was unable to personally review Mr. King's CT scan, but a comment made on the CT scan indicates evidence of emphysematous blebs. The physician stated that he does not have a full set of pulmonary function studies, but that Mr. King's degree of obstruction had improved over the previous 10 years. He opined that the miner has emphysema secondary to cigarette smoking, but would like to see a full set of pulmonary function studies before diagnosing emphysema. Dr. Pacht indicated he would like to obtain a true smoking history. The physician further opined there is not sufficient evidence to diagnose Mr. King with pneumoconiosis. (DX 28).

Dr. Eric Pacht had examined the miner on March 1, 1999 and prepared a report on February 24, 2000. He noted that the claimant has had several additional studies performed on him including a high resolution chest CT scan and additional chest x-rays, arterial blood gas studies, and pulmonary function studies. Dr. Pacht opined that the miner has moderate obstructive lung disease. He also believed that the CT scan taken on January 24, 2000 showed changes of emphysema with bullous disease. Dr. Pacht disagrees with Dr. Hume's interpretation of the CT scan that there is a ground glass appearance which suggests some chronic interstitial lung disease. The physician opined that Mr. King has emphysema secondary to cigarette smoking. He did not find any evidence of coal

workers' pneumoconiosis or any other occupationally related lung disease. (EX 3).

The medical records were reviewed by Dr. James Lockey on May 16, 2000. The physician reviewed the medical records from Dr. Pacht dated April 14, 1999 and February 24, 2000, pulmonary function studies dated March 1, 1999 and January 24, 2000, an arterial blood gas study dated January 24, 2000, a chest x-ray and a CT scan of the chest dated January 24, 2000, chest x-rays from March 1, 1999 and January 24, 2000, and a CT scan of the chest with HRCT cuts dated January 24, 2000. Dr. Lockey noted varying smoking histories of one-half pack of cigarettes per day for two years and another history of two packs of cigarettes per day. The physician also noted 17 years of underground coal mine employment and 18 years of surface mining based upon Dr. Pacht's notes. Dr. Lockey opined that Mr. King does not have pneumoconiosis. He stated that based upon the pulmonary function studies, the miner has a moderate airway obstruction with significant air trapping secondary to emphysema. The physician also stated that there are some central lobular nodular densities within the lungs noted on the HRCT scan and that if one was to accept that these represent coal workers' pneumoconiosis, they are not associated with any significant pulmonary impairment. Dr. Lockey recommends that Mr. King enter a smoking cessation program. (EX 5).

#### E. CT Scans

On October 22, 1993, the claimant underwent an enhanced CT scan of the chest. The CT scan indicated the presence of an eight millimeter nonspecific nodule in the right lower lobe. (EX 1).

Mr. King had another CT scan on May 29, 1997. This scan showed chronic pulmonary scarring with emphysematous blebs, bilaterally. A single subpleural nodule appeared in the posterior right lung. The physician noted that statistically, granuloma would be the most likely etiology, although definite benign versus malignant nature cannot be differentiated on the examination. (DX 27).

On January 24, 2000, the claimant had a CT scan. Dr. Hume noted that there was evidence of some chronic interstitial lung disease with no acute abnormality. (EX 4). Dr. Shipley noted that HRCT images were obtained in the prone position and that he listed an impression as mild to moderate emphysema, mild interstitial lung disease that is not evident on the copy radiograph. He stated that the findings are nonspecific but may represent interstitial pulmonary fibrosis. (EX 5).

## II. Discussion

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in condition." 20 C.F.R. § 725.309 (d). The United States circuit courts of appeals have developed divergent standards to determine whether "a material change in conditions" has occurred. Because Mr. King last worked as a coal miner in the Commonwealth of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Sixth Circuit has adopted the Director's position for establishing a material change in conditions. Under this approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement that previously was adjudicated against him. If a claimant establishes the existence of one of these elements, he will have demonstrated a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharon-dale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994). See *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996).

Applying the *Ross* standard, I must review the evidence submitted subsequent to December 12, 1989, the date of the prior final denial, to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Mr. King in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; (3) total disability; and (4) total disability due to pneumoconiosis. If the claimant establishes any of these elements with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

OWCP determined on December 12, 1989 that the evidence failed to prove that the claimant suffers from pneumoconiosis arising from coal mine employment and that Mr. King is totally disabled by his disease. (DX 33). Thus, I must initially determine whether the evidence submitted after that date proves Mr. King's condition has materially changed. If I conclude that the evidence establishes a change in his condition, then I must also consider the medical evidence submitted prior to the December 12, 1989 denial.

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. The record contains ten interpretations of seven chest x-rays. Of these interpretations, two were negative for pneumoconiosis, one was positive, and seven were silent as to the existence of pneumoconiosis. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. See *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

In connection with the most recent claim, Dr. Cole, a dually qualified physician, found the March 11, 1997 x-ray to be positive for pneumoconiosis at stage 1/0, p/q. However, two other dually qualified physicians, Drs. Lockey and Shipley, found a later x-ray, taken on January 24, 2000, as negative for the disease. Further, Dr. Hume noted that the January 24, 2000 x-ray showed no active disease. I find that all of the other interpretations are silent as to the existence of pneumoconiosis and, therefore, are not supportive of a finding of pneumoconiosis. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). Further, applying the "later evidence" rule, I accord heightened weight to the January 24, 2000 x-ray. *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-166 (1983). Because the negative readings constitute the majority of interpretations and are verified by highly-qualified physicians, I find that the x-ray evidence is negative for pneumoconiosis. Hence, I find that this evidence does not prove the existence of pneumoconiosis or a change in Mr. King's condition.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply

to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under this section, a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. See *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 BLR 1-22, 1-24 (1986).

Dr. Manchester indicated in his treatment notes that because the miner had previously been diagnosed with pneumoconiosis and because he believed that the claimant's condition was consistent with a person who has coal workers' pneumoconiosis, he did not do any further testing for the disease. Dr. Manchester did not explain his basis for concluding that Mr. King had pneumoconiosis, but he did indicate that the miner's chest x-ray findings and his CT scan of the chest showed findings consistent with coal workers' pneumoconiosis.

Dr. Linder diagnosed Mr. King with asthma and obstructive impairment with mild pulmonary scarring. He opined that the obstructive impairment was work related and that this diagnosis was based upon Mr. King's pulmonary function study. The physician did not diagnose the miner with pneumoconiosis, but his opinion constitutes a finding of pneumoconiosis under the definition provided in the Act and regulations. See 20 C.F.R. § 718.201.

Dr. Lockey opined that Mr. King does not have pneumoconiosis. The physician based his opinion on chest x-rays, the chest CT scans, and the pulmonary function studies which indicate that the claimant has a moderate airway obstruction with significant air trapping secondary to emphysema. Dr. Lockey further stated that there are some densities within the miner's lungs which could represent coal workers' pneumoconiosis, but they are not associated with any significant pulmonary impairment.

Dr. Pacht did not find any evidence of pneumoconiosis. He opined that the miner has emphysema secondary to cigarette smoking. Dr. Pacht disagrees with Dr. Hume's interpretation that the claimant's chest CT scan showed evidence of interstitial lung disease. He also questions the miner's actual

smoking history and feels that an accurate smoking history needs to be established before making a final diagnosis.

I give less weight to Dr. Manchester's opinion due to the fact that it appears that he based his opinion solely upon the fact Mr. King's medical history appeared to be consistent with a person with pneumoconiosis. He fails to do any additional testing and simply accepts a previous diagnosis of pneumoconiosis. Although Dr. Linder initially diagnosed pneumoconiosis, I give greater weight to Dr. Pacht's opinion based upon the fact that his examination was the most recent examination of the claimant and is, therefore, more likely to represent a more accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Also, his opinion is supported to some degree by the documented and reasoned report of Dr. Lockey.

Based upon the weight of the above medical opinions, I find that the evidence does not establish the miner suffers from pneumoconiosis. As the evidence does not establish the existence of pneumoconiosis, this claim cannot succeed. Regardless, even if the evidence had established this element, it fails to prove that claimant has a totally disabling respiratory impairment, another requisite element of entitlement.

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(2). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. See *Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(c) provides several criteria for establishing total disability. Under this section, I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

None of the pulmonary function studies performed after August 30, 1989 produced qualifying<sup>2</sup> results. Also, the more recent blood gas tests failed to produce qualifying readings. Thus, total disability has not been established by either pulmonary function studies or arterial blood gas studies.

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<sup>2</sup>A "qualifying" pulmonary function study or arterial blood gas study yields values which are equal to or less than the applicable table values, i.e., Appendices B and C of Part 718. See 20 C.F.R. § 718.204(c)(1) and (c)(2). A "non-qualifying" test produces results which exceed the requisite table values.

Section 718.204(c)(3) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Where a claimant cannot establish total disability under subparagraphs (c)(1), (c)(2), or (c)(3), Section 718.204(c)(4) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Dr. Linder opined that the claimant has an obstructive impairment unrelated to coal mine employment, but that it does not cause a significant impairment. He stated that Mr. King has a slight impairment, but it does not cause a disability. Dr. Manchester indicated that he does not feel that he can speak on the question of whether or not Mr. King is totally disabled. Dr. Pacht stated that Mr. King has moderate obstructive lung disease, but that the claimant's obstruction has improved over the past 10 years. Dr. Pacht did not offer an opinion regarding whether or not Mr. King is totally disabled. Dr. Lockey opined that the miner has a moderate airway obstruction as well as nodular densities in the lungs, but that the densities are not associated with any significant pulmonary impairment. Dr. Lockey does not opine as to whether Mr. King is totally disabled.

As no physician has concluded that Mr. King is totally disabled, the medical opinions do not establish that Mr. King is totally disabled under Section 718.204(c)(4). Moreover, the weight of all of the evidence does not support a finding under Section 718.204(c). The medical opinions also do not establish that the respiratory impairment suffered by Mr. King is due to pneumoconiosis. 20 C.F.R. § 718.204(b). Thus, this evidence also fails to prove Mr. King's condition has materially changed since the December 12, 1989 denial of his previous claim.

In sum, the evidence does not establish the existence of pneumoconiosis or a totally disabling respiratory impairment due to that disease. Since the evidence fails to prove Mr. King's condition has materially changed from the December 12, 1989 denial, the claim filed on February 11, 1997 must be denied under Section 725.309. Accordingly, benefits cannot be awarded.



Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Jackie King for benefits under the Act is denied.

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DONALD W. MOSSER  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date this decision is filed with the District Director, Office of Workers' Compensation Programs, by filing a notice of appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601. See 20 C.F.R. §§ 725.478 and 725.479. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.

